

1 Timothy R. Titolo, Esq.
2 Nevada Bar No. 003617
3 TITOLO LAW OFFICE
4 9950 West Cheyenne Ave.
5 Las Vegas, Nevada 89129
6 (702) 869-5100
7 tim@titololaw.com

8
9 John D. McKay, Esq.
10 *Admitted pro hac vice*
11 PARK AVENUE LAW LLC
12 127 W. Fairbanks Ave. No. 519
13 Winter Park, Florida 32789
14 (434) 531-9569
15 johndmckayatty@gmail.com

16
17 ***Attorneys for Plaintiffs***

18
19 **UNITED STATES DISTRICT COURT**
20 **FOR THE DISTRICT OF NEVADA**

21
22 PETER DELVECCHIA, *et al.*,) **Case No: 2:19-CV-01322-KJD-DJA**
23 Plaintiffs,)
24)
25 vs.) **PLAINTIFFS' OPPOSITION TO**
26) **DEFENDANT FRONTIER'S**
27) **MOTION FOR PROTECTIVE ORDER**
28 FRONTIER AIRLINES, INC., *et al.*,) **(ECF No. 137)**
FRONTIER AIRLINES, INC., *et al.*,)
Defendants.)
-----)

29
30 Plaintiffs, Peter DelVecchia (“Peter”) individually and as next friend of A. D., a minor, by
31 counsel, hereby file this Opposition to Defendant Frontier Airlines, Inc.’s (“Frontier’s”) Motion for a
32 Protective Order (ECF No. 137) regarding Exhibit A to Plaintiffs’ Motion for Sanctions (ECF No.
33 128), which exhibit was filed under seal for the sole reason that Defendants had designated its
34 contents as “CONFIDENTIAL” under the parties’ Agreed Protective Order entered in this case on
35 October 10, 2019 (ECF No. 37). For the reasons set forth below, including Frontier’s failure to follow

1 the required procedure and failure to meet the Ninth Circuit's legal standards required for sealing
 2 documents, the Motion should be denied.

3 **ARGUMENT**

4 **I. Frontier has not followed the procedure mandated by the Court's October 10, 2019 separate Order (ECF No. 38), so the documents should be unsealed.**

5 When this Court approved the Agreed Protective Order that Frontier had insisted on having
 6 entered in this case, it entered a separate Order on the same date, October 10, 2019, reminding
 7 counsel of the presumption in favor of public access to judicial records outlined in the Ninth Circuit's
 8 opinion in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006), and clarifying
 9 that the entry of the parties' Agreed Protective Order did not, in and of itself, establish the
 10 confidentiality of any document designated under it:

11 The Court has approved the blanket protective order to facilitate discovery
 12 exchanges. But there has been no showing, and the Court has not found, that any
 13 specific documents are secret or confidential. The parties have not provided specific
 14 facts supported by declarations or concrete examples to establish that a protective order
 15 is required to protect any specific trade secret or other confidential information pursuant
 16 to Rule 26(c) or that disclosure would cause an identifiable and significant harm.

17 ECF No. 38, at 1-2 (emphasis in original). The Court also instructed the parties to follow a specific
 18 procedure in cases where the motion to seal is based solely on the fact that another party has
 19 designated a document as confidential, which is precisely the situation in the instant Motion:

20 If the sole ground for a motion to seal is that the opposing party (or non-party) has
 21 designated a document as confidential, the designator shall file (within seven days of
 22 the filing of the motion to seal) either (1) a declaration establishing sufficient
 23 justification for sealing each document at issue or (2) a notice of withdrawal of the
 24 designation(s) and consent to unsealing. If neither filing is made, the Court may order
 the document(s) unsealed without further notice.

25 **IT IS ORDERED** that counsel shall comply with the requirements of Local Rule IA
 26 10-5, the Ninth Circuit's decision in *Kamakana*, 447 F.3d 1172, and the procedures
 27 outlined above, with respect to any documents filed under seal. To the extent any aspect
of the stipulated protective order may conflict with this order or Local Rule IA 10-5,
that aspect of the stipulated protective order is hereby superseded with this order.

1 *Id.*, at 2 (underlining in original). Frontier has not complied with that procedure, even though
 2 Plaintiffs' Motion to Seal (ECF No. 130) concerning Exhibit A to their Motion for Sanctions
 3 explicitly stated that "The sole reason for Plaintiffs seeking leave to file the documents under seal is
 4 that Frontier produced them stamped "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER"
 5 indicating designation under the Protective Order entered in this action on October 10, 2019 (ECF
 6 No. 37)." ECF No. 130, at 1-2. Frontier, as the "designator," was required to file either "a declaration
 7 establishing sufficient justification for sealing each document at issue," or "a notice of withdrawal of
 8 the designation(s) and consent to unsealing." ECF No. 38, at 2. It has filed neither. The deadline for
 9 doing so was seven days after Plaintiffs' filing of the Motion to Seal on August 20, 2021, which was
 10 August 27.¹ As the Court's Order clearly indicates, failure to make either filing means "the Court
 11 may order the document(s) unsealed without further notice." *Id.* Frontier's failure to follow the
 12 Court's specifically mandated procedure therefore justifies unsealing the documents and denying its
 13 Motion.

14

15 **II. Frontier's Motion does not meet the *Kamakana* standards for establishing that**
the documents need to be kept under seal.

16

17 The Court notified the parties in no uncertain terms that the standards discussed in *Kamakana*
 18 would control the resolution of any dispute concerning whether or not the contents of any document
 19 justified filing the document under seal. *See* ECF No. 38 at 1-2. The *Kamakana* Court held:
 20

21

22 Unless a particular court record is one traditionally kept secret, a strong presumption in
 23 favor of access is the starting point. A party seeking to seal a judicial record then bears
 24 the burden of overcoming this strong presumption by meeting the "compelling reasons"
 25 standard. That is, the party must articulate compelling reasons supported by specific

26

27

28 ¹ Paragraph 3 of the parties' Agreed Protective Order (ECF No. 37) states that a designator has 30 days after being
 29 notified of a challenge to a particular document's designation to file "a specific Motion for Protective Order with respect
 30 to such material." That is apparently the procedure Frontier has followed, *see* Motion at 3. However, that procedure is not
 31 for responding to a Motion to Seal, and the Court's Order (ECF No. 38) for such circumstances specifically provides, in
underlined text, that its terms supersede any conflicting terms in the parties' stipulated protective order. *See* ECF No. 38
 at 2.

1 factual findings, that outweigh the general history of access and the public policies
 2 favoring disclosure, such as the public interest in understanding the judicial process.
 3

447 F.3d, at 1178-79 (internal citations and quotation marks omitted). The Court went on to
 3
 4 enunciate a specific standard for what constitutes “compelling reasons”:

5 In general, “compelling reasons” sufficient to outweigh the public’s interest in
 6 disclosure and justify sealing court records exist when such court files might have
 7 become a vehicle for improper purposes, such as the use of records to gratify private
 8 spite, promote public scandal, circulate libelous statements, or release trade secrets. The
 9 mere fact that the production of records may lead to a litigant’s embarrassment,
 10 incrimination, or exposure to further litigation will not, without more, compel the court
 11 to seal its records.
 12

13 *Id.*, at 1179 (internal citations and quotation marks omitted). Although the *Kamakana* Court carved
 14 out an exception to the “compelling reasons” requirement for documents filed with “non-dispositive
 15 motions,” requiring only good cause to be shown for sealing such documents, *see id.* at 1179-80, the
 16 Ninth Circuit revisited that exception a decade later in *Center for Auto Safety v. Chrysler Grp., LLC*,
 17 809 F.3d 1092 (9th Cir. 2016)(“CAS”), to align with other Circuits that “reject[] a mechanistic rule to
 18 determine when the presumption of public access applies.” 809 F.3d, at 1099. Instead of applying a
 19 purely literal distinction between “dispositive” and “non-dispositive” motions, as had been suggested
 20 in *Kamakana*, the *CAS* Court held that the distinction between applying the “compelling reasons” test
 21 or the “good cause” test should rest with how the subject motion relates to the merits of the case:
 22

23 Consistent with our precedent, we make clear that public access to filed motions and
 24 their attachments does not merely depend on whether the motion is technically
 25 “dispositive.” Rather, public access will turn on whether the motion is more than
 26 tangentially related to the merits of a case. While many technically nondispositive
 27 motions will fail this test, some will pass. Our reading of the public access cases is
 28 consistent with our own case law, and more importantly, comports with the old tradition
 29 of ensuring public access which “antedates the Constitution and ... is now beyond
 30 dispute.”

31 809 F.3d, at 1101 (quoting *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir.
 32 1993)).
 33

1 Applying the *Kamakana* standards and the *CAS* clarification, it is clear that the “compelling
 2 reasons” test applies to the Motion for Sanctions and its Exhibit A, rather than the “good cause”
 3 test—although Frontier’s Motion fails to meet the standards of either test.

4 Plaintiffs’ Motion for Rule 37 Sanctions (ECF No. 128) is far more than “tangentially” related
 5 to the merits of Plaintiffs’ claims under 42 U.S.C. §1981. It pertains to a years-long history of
 6 Frontier condoning racial and ethnic stereotyping and discriminating against its passengers of color
 7 by its employees, including flight attendants, pilots and other managerial staff, and falsely accusing
 8 mixed race groups of passengers of human trafficking for sexual purposes, forcing many of them to
 9 undergo the humiliation of being turned over to law enforcement authorities at the end of flights,
 10 often in full view of the other passengers. The documents attached to the Motion describe numerous
 11 instances of such incidents and their condonation by fellow employees and managerial staff, even
 12 though none of the reports indicate that the accusations were well-founded in truth, and some even
 13 reveal that the law enforcement authorities investigated the accusations and reported back to Frontier
 14 that they found no wrongdoing by the passengers at all. Those documents, as well as hundreds of
 15 others produced by Frontier after the Motion was filed—which will be the subject of a supplemental
 16 motion for sanctions due to their improper redactions—reveal that Frontier’s customer service
 17 personnel routinely responded to customer complaints of discrimination with a boilerplate assertion
 18 that the company does not condone discrimination, while taking no steps whatsoever to investigate
 19 the complaints, discipline employees, or even train employees in the avoidance of passenger
 20 discrimination despite being specifically informed by the Department of Transportation of the federal
 21 statutes prohibiting discrimination and the need for specific training.² Plaintiffs were just some of the
 22
 23
 24
 25
 26
 27

27 ² In fact, the constant repetition of customer complaints and Frontier’s boilerplate vacuous responses over a five-year
 28 period strongly suggests that the pattern has probably continued for decades, although the Court limited Plaintiffs’
 discovery to only five years prior to their own incidents, *see* ECF No. 83.

1 more recent victims of Frontier's pattern of discrimination, and their §1981 claims stem from this
 2 repeated and reprehensible pattern. Their Motion for Sanctions addresses Frontier's deliberate
 3 conduct to prevent disclosure of the pattern in discovery, by asserting baseless boilerplate objections
 4 to discovery requests and delaying production of relevant documents even after two Court Orders
 5 compelling production. Moreover, it addresses the fact that Frontier has, wholly without valid legal
 6 authority or Court authorization, redacted from the documents it has produced all identifying
 7 information about the complaining passengers and the accused passengers, and even some of the
 8 identifying information about the Frontier employees involved (such as employee numbers), with the
 9 obvious aim of preventing Plaintiffs from obtaining statements and other evidence from the persons
 10 most knowledgeable about this pattern of discrimination.³ The subject matter, a longstanding pattern
 11 of racial and ethnic discrimination and false charges of human sex trafficking that Frontier has
 12 attempted to sweep under the rug, is central to the merits of Plaintiffs' §1981 claims, and therefore
 13 warrants the application of the "compelling reasons" test under *Kamakana* and *CAS*.

16 Frontier's Motion for Protective Order does not provide declarations or specific findings of
 17 fact to support any claim that the incident reports and customer complaints might, if unsealed,
 18 "become a vehicle for improper purposes, such as the use of records to gratify private spite, promote
 19 public scandal, circulate libelous statements, or release trade secrets." *Kamakana*, 447 F.3d, at 1179.
 20 It has not demonstrated that the information contained in those records is of a type "traditionally kept
 21 secret," *id.* at 1178, but only claims that it is information that "*Frontier* maintains in strict
 22 confidence," Motion at 4, which is an altogether different and self-serving standard. Where the
 23 central issue is one of the public's historical expectation of access to judicial records, the alleged
 24 habits of a single corporation are not the "tradition" to which the Ninth Circuit referred. Frontier's
 25

28 ³ It is even possible that Frontier has obliterated additional types of information in its numerous redactions, because it has failed to provide Plaintiffs with any type of redaction log.

1 stated concern that public disclosure of prior complaints of discrimination and false accusations of
 2 criminal behavior levied at mixed race passenger groups “could also result in unwarranted and
 3 unnecessary negative commercial repercussions to Frontier,” *see id.* at 6, is precisely the kind of non-
 4 determinative assertion that the Ninth Circuit referenced in stating, “[t]he mere fact that the
 5 production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further
 6 litigation will not, without more, compel the court to seal its records.” *Kamakana*, 447 F.3d, at 1179.
 7 Its claim that disclosure of the records would demonstrate “how Frontier addressed those situations in
 8 accordance with their [sic] internal policies and procedures,” Motion at 6, is equally unpersuasive
 9 since examination of the records reveals that it did not deal with the customer complaints or
 10 discipline its employees for making false accusations at all. That is the point discussed in Plaintiffs’
 11 Motion for Sanctions.

14 Remarkably, Frontier’s Motion never mentions the controlling Ninth Circuit precedent.
 15 Instead, it bases its entire argument that “federal case law supports Frontier’s request that the
 16 confidentiality of such documents be maintained,” *see* Motion at 4-5, on several non-precedential
 17 district court opinions from other Circuits. Examination of those district court opinions reveals few if
 18 any similarities to the instant situation. For example, the plaintiffs in *Dozier v. Waffle House, Inc.*,
 19 2005 U.S. Dist. LEXIS 40245 (N.D. Ga. May 4, 2005), were not seeking evidence to support a
 20 pattern of longstanding discrimination against people of color or mixed race groups; the district court
 21 determined that the plaintiffs were merely interested in “sharing information with other Waffle House
 22 litigants.” Case No. 1:03-cv-03093-ODE (N.D. Ga. May 4, 2005), slip op. at 31-32. *Abreu v. New*
 23 *Jersey*, 2015 U.S. Dist. LEXIS 172621 (D.N.J. Dec. 29, 2015), *Gillum v. ICF Emergency Mgmt.*
 24 *Servs., L.L.C.*, No. 08-314-C-M2, 2009 U.S. Dist. LEXIS 60693 (M.D. La. July 16, 2009), and
 25 *McKenna v. City of Philadelphia*, 2000 U.S. Dist. LEXIS 15735 (E.D. Pa. Sept. 29, 2000), all were
 26
 27
 28

1 decisions on motions to compel discovery, not motions to seal documents, and the district court's
 2 accompanying Order to its Memorandum Opinion in *Rosenblit v. City of Philadelphia*, No 20-3121-
 3 KSM, 2021 U.S. Dist. LEXIS 16042 (E.D. Pa. January 28, 2021), specifically stated: "Nothing in this
 4 opinion authorizes the filing of any document under seal." *See Order, January 28, 2021, at 2 ¶ 5*
 5 (copy attached hereto as **Exhibit A**). Thus, besides being non-precedential, the decisions cited by
 6 Frontier are inapposite. Nothing in Frontier's Motion establishes that compelling reasons exist
 7 requiring the specific documents attached to Plaintiffs' Motion for Rule 37 Sanctions as Exhibit A to
 8 be kept under seal.

10 **III. Frontier fails to identify any specific harm that would result from unsealing the**
 11 **documents.**

12 Even under the lesser standard of "good cause" borrowed from Rule 26(c), Frontier was
 13 required to identify specific harm that would result from unsealing the particular documents that are
 14 included in Exhibit A to the Motion for Sanctions. In the context of a motion for protective order, the
 15 Ninth Circuit has made it clear that "[b]road allegations of harm, unsubstantiated by specific
 16 examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Industries, Inc. v.*
 17 *International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)(quoting *Cipollone v. Liggett Group, Inc.*,
 18 785 F.2d 1108, 1121 (3rd Cir.1986)). Yet, that is all that Frontier offers. In the two short paragraphs
 19 of its 8-page Motion that discuss the specific documents in question, Frontier makes one blanket
 20 claim concerning all of the exhibit's contents, claiming that unsealing them "could result in undue
 21 and wholly unnecessary hardship to those individuals" identified in the documents, without
 22 specifying how exactly that might occur, what hardships they might incur, or at whose hands. Motion
 23 at 6. It also states without basis that it would be harmed by "demonstrating how Frontier addressed
 24 those situations in accordance with their [sic] internal policies and procedures," although an
 25 examination of the documents reveals that Frontier did not investigate the incidents at all and the
 26
 27
 28

1 reports do not disclose any internal procedures. That is a far cry from the situation in *Republic Servs.*
 2 *v. Liberty Mut. Ins. Cos.*, No. 03-494-KSF, 2006 U.S. Dist. LEXIS 38752, at *22 (E.D. Ky. June 9,
 3 2006), also cited by Frontier, where the moving party identified numerous specific documents for *in*
 4 *camera* review that outlined its proprietary claims-handling procedures, and provided specific details
 5 of how it would sustain identifiable financial loss from the disclosure of such policies to its
 6 competitors.

7 Frontier's broad and unsubstantiated claims of harm from unsealing the documents do not
 8 amount to the "facts supported by declarations or concrete examples to establish that a protective
 9 order is required to protect any specific trade secret or other confidential information pursuant to Rule
 10 26(c) or that disclosure would cause an identifiable and significant harm" that this Court specifically
 11 put it on notice would be required in its Order entered on the docket nearly three years ago. ECF No.
 12 38, at 1-2.

13 Finally, Frontier makes the outrageous claim that unsealing the documents in Exhibit A to the
 14 Motion for Sanctions would identify the passengers who complained of discriminatory treatment,
 15 while acknowledging at the same time that it has (inappropriately) redacted all passenger-identifying
 16 information. *See* Motion at 6. Clearly, unsealing Exhibit A to the Motion for Sanctions could not
 17 have the effect of identifying persons whose details have been redacted.

18 **IV. Frontier's Motion for Protective Order contains no specific terms for such an**
 19 **Order.**

20 Frontier's Motion should also be denied because it does not specify any terms for the Order it
 21 seeks, only that it "seeks a specific protective order with respect to the challenged documents,"
 22 Motion at 3, and that the Court should "enter a protective order maintaining the confidentiality of the
 23 documents . . . and . . . such further relief as this Court deems just and reasonable." *Id.* at 8. The
 24 Motion fails to request any specific terms, such as how the documents can be used in depositions or
 25

1 at trial, or other important terms such as who may view them. Simply ordering that the documents are
2 “confidential” would create unnecessary confusion as to whether, for example, Plaintiffs’ experts
3 may view the documents in order to form opinions concerning Frontier’s pattern of discriminatory
4 behavior. That would result in unfair restrictions on Plaintiffs’ ability to prove their §1981 claims.
5

6 **V. Plaintiffs’ counsel did not decline to participate in a meet-and-confer session.**

7 The certification at the beginning of Frontier’s Motion could be read as suggesting that
8 Plaintiff’s counsel declined to participate in a meet-and-confer session that Frontier’s counsel was
9 trying to arrange. That was not the case. Mr. Maye’s voicemail message and follow-up email, which
10 were received by Plaintiffs’ counsel in Europe late in the evening and past midnight, respectively,⁴
11 did not ask for participation in a meet-and-confer session. Instead, each asked a solitary question:
12 whether Plaintiffs continued to maintain that the documents contained in Exhibit A were
13 inappropriately designated as “CONFIDENTIAL” under the Agreed Protective Order (ECF No. 37).
14 In light of the fact that counsel were separated at the time by seven time zones, Plaintiffs’ counsel
15 deemed it to be most expedient to answer that single question in the affirmative by an email sent to
16 Mr. Maye at the beginning of the next business day. During the nearly three years that this litigation
17 has been active, Plaintiffs’ counsel has never declined to participate in a meet-and-confer session
18 when one was requested as such (nor have defense counsel).
19

20 **CONCLUSION**

21 For all of the reasons set forth above, Plaintiffs respectfully submit that Frontier’s Motion for
22 Protective Order should be denied.
23

24 DATED this 28th day of September, 2021.

25 _____/s/ John D. McKay
26 *Attorney for Plaintiffs Peter DelVecchia*
27 *And A.D., a Minor*

28 _____
29 ⁴ Plaintiffs’ counsel was asleep when both communications were received, and listened to/viewed them the following day,
which was a Saturday.